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NO. 35805-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF DAVID MCCUISTION,

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Court Rules

Other Authorities

A. ARGUMENT.

1. BY STRICTLY LIMITING THE TYPE OF EVIDENCE THAT MAY BE USED TO WIN A NEW COMMITMENT TRIAL, THE STATE IMPERMISSIBLY PERMITS THE CONTINUED COMMITMENT OF PEOPLE WHO ARE NOT MENTALLY ILL OR DANGEROUS, IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW.

In his opening brief seeking discretionary review of the trial court's denial of his request for a recommitment hearing, Mr. McCuistion addressed in detail the due process violations inherent in the statutory scheme that limits his ability to seek a new trial on the grounds that he no longer meets the criteria for commitment. The State's response essentially quotes from the Court of Appeals ruling in In re Detention of Fox, 138 Wn.App. 374, 158 P.3d 69 (2007). Since Mr. McCuistion discussed Fox at length in his initial brief, and the continued validity of Fox is now in question, he will not repeat those arguments. Mr. McCuistion will address the new and particularly unfounded arguments raised by the State.

a. The State's policy arguments are specious. The State fundamentally misrepresents Mr. McCuistion's legal arguments in contending that he seeks to open floodgates to release all indefinitely committed special offenders. Resp. at 15-

19. Contrary to the State's "floodgate" depiction of his legal arguments, giving due consideration to the qualified defense expert's opinion that Mr. McCuistion does not meet the criteria for commitment does not mean every offender will receive a full committment trial every year.

As the court recognized in In re Detention of Ambers, 160 Wn.2d 543, 553 n.5, 158 P.3d 1144 (2007), an SVP petitioner in a show cause hearing may not rely on an expert that the trial judge deems unqualified or upon evidence the judge deems unhelpful to the jury to meet the bare prima facie standard necessary for a new hearing. Scientific assertions by an expert would also have to meet the Frye test for admissibility to be considered even under the show cause standard. Id.

Additionally, as the court in Young recognized, a petitioner would not meet the standard for a new commitment hearing by simply presenting the identical information litigated in the prior year's hearing. In re the Detention of Young, 120 Wn.App. 753, 764, 86 P.3d 810, review denied, 152 Wn.2d 1007, 99 P.3d 896 (2004) (noting that a detainee "cannot simply raise the same evidence again to obtain a new hearing at his next annual show cause proceeding" when it is unlikely he can show he has so

changed in a single year). Furthermore, the State retains the right to move for summary judgment in a recommitment trial when conclusions are not supported by relevant facts. Id. at 764; see In re Detention of Mathers, 100 Wn.App. 336, 340, 998 P.2d 336 (2000) (granting State's motion for summary judgment in SVP trial because there was "no legally sufficient evidentiary basis" for new trial).

Mr. McCuistion has a right to a hearing when he presents probable cause that he does not meet the criteria for commitment. The Legislature did not change the probable cause standard when it rewrote RCW 71.09.090 in 2005 and, as a matter of due process, he cannot be held indefinitely when there are grounds to argue he does not meet the criteria for commitment.

b. The State's refusal to provide an effective and meaningful mechanism for periodic review amounts to a deprivation of due process. While the State may indefinitely confine an individual under a civil commitment scheme, "periodic review of the patient's suitability for release" is essential for the constitutionality the confinement. Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984); see Kansas v. Hendricks, 521 U.S. 346, 364, 117 S.Ct. 2072, 138 L.Ed.2d 501

(1997). Similarly, while the fact of the initial commitment may allow a court to infer basis of the commitment continues, "that inference does not last indefinitely." State v. Sommerville, 86 Wn.App. 700, 710, 937 P.2d 1317 (1997).

The prosecution contends that Mr. McCuistion must litigate any challenge to his continued indefinite confinement by filing a motion under CR 60, personal restraint petition, or habeas corpus petition. The prosecution does not even mention the legal standards for filing such claims, including strict statutes of limitations. For example, newly discovered evidence must be brought within one year from the date of judgment for a CR 60(b) motion, and a writ of habeas corpus must be filed in federal court within one year of the date on which petitioner's state court judgment became final, and cannot be successive. 28 U.S.C. section 2244(d)(1).

Moreover, these claims are narrowly restricted to those that raise a legal error in the underlying trial. A personal restraint petition permits newly discovered evidence only if it could not have been discovered earlier with reasonable diligence, is not impeaching or cumulative evidence, and will probably change the result of the trial. In re Pers. Restraint of Brown, 143 Wn.2d 431,

453, 21 P.3d 687 (2001); RAP 16.4; RCW 10.73.090. A habeas petition requires a prior ruling contrary to clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. 2254(d). If the United States Supreme Court does not have an established clearly settled precedent on the issue, the habeas claim necessarily fails.

Since the nature of the new trial motion would necessarily involve repetition of facts already argued at the earlier trial and arguably involves evidence of a mental statute that would have been available earlier, it would be seemingly impossible to meet this legal standard. These alternative avenues for presenting the claim that an indefinitely held detainee does not meet the criteria for commitment are an inadequate and insufficient substitute for the due process requires when the State elects to institute lifelong civil commitments.

c. In light of the State's concession that *Fox* should be reversed and remanded, this Court should not rely on *Fox*. In a footnote, the prosecution notes that it has asked the Supreme Court to reverse and remand the pending petitions for review in Fox, as it is contrary to the Supreme Court's recent decision in In re the Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007).

While the State's concession of error does not stretch to the due process violation alleged in the case at bar, the erroneous application of the retroactivity analysis signals an appropriate opening to revisit the decision in Fox, especially in light of Judge Armstrong's well-reasoned dissent. Moreover, the Supreme Court filed its decision in Ambers, one month after Fox, and Ambers casts doubt on the constitutional analysis in Fox. Ambers, 160 Wn.2d at 553 n.4 (noting likely unconstitutional to impose more stringent standard for release at annual review hearing than for original confinement).

In Ambers, the Washington Supreme Court rejected the State's claim that the 2005 amendments to RCW 71.09.090 placed more stringent requirements on a person seeking release from total confinement than the standards in place at the original commitment hearing. 160 Wn.2d at 553. The Ambers Court ruled that a person must merely show that he or she no longer meets the definition of an SVP in order to obtain further review of the commitment order. 160 Wn.2d at 552-57 (determining that issue at annual review hearing remains whether petitioner "meets the definition of an SVP"). Because Fox was decided without the benefit of Ambers, it

should not be relied on as setting any binding, or even accurate, precedent.

2. THE TRIAL COURT COMMITTED PROBABLE OR OBVIOUS ERROR REQUIRING REVIEW AND REVERSAL

a. Mr. McCuistion presented a prima facie case that his condition had changed. One of the several misrepresentations made in the State's response brief is its argument that Mr. McCuistion's behavior while at the Special Commitment Center has no bearing on his ability to act appropriately, because DSHS has "controlled his behavior." Resp. Brf. at 25. The fallacy of this argument is apparent not only from the evidence Mr. McCuistion introduced of his good behavior as opposed to the numerous rule violations by other inmates, the Seattle Times further documents DSHS's quite poor "control" over inmates who continue to violate rules of behavior even while in DSHS custody. Jonathan Martin, Sex offenders at State Center Getting Porn, Seattle Times, A1 (Jan. 7, 2008) ("In the past two years, at least four of the 267 residents have been charged with possessing illegal pornography, and officials there are investigating several others.").[1] Unlike offenders who possess pornography or display other fundamental

behavioral problems, Mr. McCuistion's daily activity has been strictly monitored and he has barely even spoken out of turn in several years of living in total confinement at the SCC. Four staff members attested to this good behavior.

More importantly, the trial court refused to properly view the evidence, weighing it rather than judging whether there was prima facie showing of a changed condition. The trial court denied the motion for a commitment trial because it felt the State's experts were more persuasive than Mr. McCuistion's expert, which is an impermissible weighing of evidence at this stage. In re Detention of Petersen, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002).

Finally, the State's claim of financial disincentive is patently baseless. The State spent years defending its own failure to provide any meaningful treatment at SCC. It chooses to civilly commit and indefinitely detain people after they served their prison sentences for their offenses out of a sense it will benefit the public to do so. It may not choose to deny the individuals indefinitely detained the right to seek relief on the grounds they no longer meet the criteria for commitment simply because it is expensive for the State to maintain these confinements.

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[1] Available at:

b. This Court should grant discretionary review. The considerations governing discretionary review are set forth in RAP 2.3(b). In particular, RAP 2.3(b)(1) provides that discretionary review may be granted when, "the superior court has committed an obvious error which would render further proceedings useless." RAP 2.3(b)(2) provides that discretionary review may be granted when, "The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act."

In Young, the Court of Appeals reviewed on appeal the trial court's denial of a recommitment trial on the issue of whether the offender had presented sufficient evidence to meet the probable cause standard necessary for a new hearing. 120 Wn.App. at 758-63. The Court of Appeals reversed the trial court's determination that Mr. Young had not presented evidence showing probable cause that he no longer met the criteria for commitment. Id. at 762-63. The Young Court found that the trial court improperly rejected the motion for a recommitment trial because it weighed the evidence Mr. Young presented, rather than taking the evidence in the light most favorable to the petitioner.

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http://seattletimes.nwsource.com/html/localnews/2004111167_mcneil07m.html.

In Elmore, both the State and Mr. Elmore appealed from a trial court's order granting in part a motion for a full recommitment trial. 162 Wn.2d at 32. The Court of Appeals found Mr. Elmore had not met the criteria for a recommitment trial but the Washington Supreme Court reversed and ruled that he must be provided the recommitment trial based on all issues for which his expert offered probable cause to believe he did not meet the commitment criteria. See In re Detention of Elmore, 134 Wn.App. 402, 139 P.3d 1140, reversed by, 162 Wn.2d at36.

Similarly to the issues raised in Elmore, Young, Fox, and the cases discussed in Petitioner's Brief, Mr. McCuistion contends that the trial court erroneously denied him a recommitment trial despite the sufficiency of evidence supporting probable cause and Mr. McCuistion's case unquestionably meets the criteria of RAP 2.3(b)(1) and (2). The court's probable cause analysis was fundamentally and obviously erroneous because it improperly weighed the expert evidence. The court's ruling is probably erroneous in its application of the statutory amendments to RCW 71.09.090, in light of the Elmore and Ambers decisions that post-date the trial court's ruling.

Furthermore, the superior court ruling substantially limits Mr. McCuistion's freedom because it results in his continued indefinite custodial detention. The ramifications of trial court's order are extend beyond the given year of the show cause hearing, as a court reviewing Mr. McCuistion's next motion for annual review may find that he has not "so changed" from the court's last order denying a recommitment trial, without weighing the impropriety of that earlier order. See Young, 120 Wn.App. at 764 (noting that a detainee "cannot simply raise the same evidence again to obtain a new hearing at his next annual show cause proceeding" when it is unlikely he can show he has so changed in a single year).

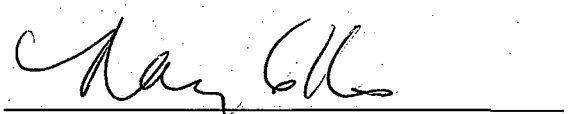
In sum, this Court should accept review of Mr. McCuistion's motion to review the trial court's order under RAP 2.3(b) and reverse the order based on the trial court's obviously erroneous interpretation and application of the law entitling Mr. McCuistion to a recommitment hearing, an error resulting in his continued confinement.

B. CONCLUSION.

For the foregoing reasons and those argued in Mr. McCuistion's opening brief, Mr. McCuistion respectfully requests this Court order that he receive a new commitment trial.

DATED this 11th day of January 2008.

Respectfully submitted,



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DIVISION TWO

IN RE THE DETENTION OF	)	
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D.M.,	)	
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APPELLANT.	)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 11TH DAY OF JANUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON, AAG OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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